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June 27, 2007

Alan Bersin, Chair, and Members
Interim Strong Mayor Subcommittee
San Diego Charter Review Committee
City of San Diego
202 C Street
San Diego, CA 92101

SUBJECT: Agenda of June 29, Interim Strong Mayor Subcommittee, Item 1 – Whether a ballot measure should be proposed to amend the City Charter so that the Mayor is designated Executive Director of the Redevelopment Agency

Dear Mr. Bersin and Members of the Subcommittee:

I am unable to attend the June 29 meeting, so I am presenting this letter to formalize and expand upon the comments I offered on June 15 on the above subject. The comments that I offer are solely my own as a resident of San Diego and an interested citizen, and are not made on behalf of a client.

My qualifications for offering these comments are as an attorney who practices in the area of redevelopment, as a former acting Deputy Executive Director of the San Diego Redevelopment Agency (October, 1998, February, 2000), as a 25-year professional in community economic development, and as a former Adjunct Professor at San Diego State University's Center for Community Economic Development where I taught Legal Structures of Community Economic Development.

In my opinion, the Charter Review Committee should not propose a ballot measure to amend the City Charter so that the Mayor is designated Executive Director of the Redevelopment Agency. There are two legal considerations, an ethical consideration, and a practical administrative consideration that lead me to this recommendation.

Legal Consideration 1: The City Charter does not govern the Redevelopment Agency

The San Diego Redevelopment Agency is a legally separate entity from the City of San Diego, and as such the City Charter does not govern the Redevelopment Agency. A redevelopment agency is an instrumentality of the State and is governed by State law. State law vests responsibility with the local legislative body to determine how redevelopment is to be administered within its jurisdiction. The City Council, as San Diego's legislative body, has determined that the members of the Council shall serve as the Agency Board, as permitted by State law. Besides the common membership of the Council and Agency Board, there are other relationships between the City and the Agency, as stipulated in State law and as a practical matter of administration. Despite these overlaps, the two entities are legally separate and distinct.

If a ballot measure to designate the Mayor as Executive Director were to be passed, it would set up an unnecessary legal conflict between the Agency Board and the Mayor. The Agency Board could choose to follow the mandate of the electorate and appoint the Mayor as Executive Director, but it would have no legal obligation to do so. If it made the appointment, the potential would remain open for a legal challenge to the Mayor's authority over redevelopment, whether by an Agency Board member who might be unhappy about some issue or by a member of the public.

There may be some novel legal reasoning under which a City Charter provision can override State law. However, the weight of opinion is against such novelty. More importantly, novel legal reasoning would prevail, if at all, only after lengthy and expensive legal proceedings. While those proceedings are pending, the conduct of Agency business would be interrupted. Agency business, especially in the eleven redevelopment project areas administered by City staff, has already been interrupted too much in the last few years.

Legal Consideration 2: Common law prohibition against elected officials serving in an administrative capacity

California courts recognize a common law prohibition against an elected official from serving in a position normally held by a full-time, paid administrator. The rule recognizes some exceptions. Under the current arrangement, the Agency Board has delegated Agency administration to the Mayor on an interim basis. Given Proposition F's interim status, appointing the Mayor as interim Agency Director is likely a reasonable exception to the common law rule. If the Agency Board were to make such appointment permanent, then a legal question would arise as to whether the appointment falls within a permitted exception to the common law rule (which, for this analysis, I will not go into). Should, however, that discretion be removed from the Agency Board and determined by the Charter, then the legal analysis would be further complicated by the first legal concern described above.

Ethical Consideration: Conflict of interest

As noted above, the San Diego Redevelopment Agency is a legally separate entity from the City of San Diego. In most circumstances, the interests of the two entities are parallel. However, it is foreseeable that the interests may sometimes diverge. Indeed, conflicts have arisen often at a staff level between Agency and City administration staff. Those differences were usually worked out, but in some cases they were issues that required policy direction from the Agency Board. If the Mayor were to serve as the chief administrative officer of both the City and the Agency, he could foreseeably be placed in a conflict of interest. (It should be noted that the same analysis applies to the City Attorney serving as Agency Legal Counsel.)

Administration Consideration: "Best practices"

The basic practical question is whether the Mayor can serve as both the chief administrative officer of the City, clearly a full-time job, while working in another position requiring full-time commitment. It is as though the Mayor, faced with the resignation of the Police Chief, decides to appoint himself in that capacity.

The California Redevelopment Association (CRA), an organization for redevelopment professionals, provides guidance on administrative “best practices.” CRA recommends that Agencies, as legally separate from the local legislative bodies that establish the Agencies, provide for professional, rather than political, administration. The reason for this is that the redevelopment law is itself complicated and technical, and redevelopment transactions are necessarily conducted in a tension between public disclosure and confidentiality. Professionalism at the administrative level ensures oversight at the policy level.

It has been argued that appointment of the Mayor as Agency Executive Director is analogous to the pre-Proposition F appointment of the City Manager as Agency Executive Director, and that the Mayor as a practical matter would delegate day-to-day administrative responsibility to a specific professional under his chain of command just as the City Manager delegated Agency management and signature authority to me when I served as acting Deputy Executive Director. There are two flaws to this reasoning.

The first flaw to the analogy is that, as an elected official, the Mayor has policy as well as administrative duties. Even though day-to-day work might be carried out by a professional delegatee, any policy conflicts that the professional would present up the chain of command between the Mayor and the Agency have the risk of being decided in favor of the Mayor’s policy perspective rather than being presented to the Agency Board where the legal authority resides. This raises the previously noted issue of conflict of interest. A related, more insidious concern is that a transaction negotiation conducted in privacy under the Mayor’s authority has the risk on some occasion of bypassing appropriate disclosure to Agency Board members.

The second flaw in analogizing from the City Manager experience is that San Diego has a fundamentally flawed redevelopment organizational structure. It is an artifact of San Diego’s history, with decisions that made sense at one time outliving their usefulness. The current structure is unfair in terms of distributing Agency resources and needlessly costly because of its inefficiency. It hardly makes sense that the Mayor adopt an administrative role that worked poorly under the City Manager.

Rather than focusing on whether the Mayor should become the Redevelopment Agency Executive Director, the larger question is what role should the Mayor, as a City-wide elected official, play in redevelopment. There are two possible approaches to answering that question. One approach is, by Charter amendment, to return the Mayor to membership on the City Council, which would return the Mayor to the Redevelopment Agency Board.

Another approach is that the City Council sitting as the Redevelopment Agency Board can undertake a comprehensive change to the Agency’s administrative structure and processes. This is a task which, as noted above, the Agency should undertake in any event in the interest of fairness and efficiency. The restructuring should take into account redevelopment administration “best practices,” the pending performance audit of SEDC, broad input from members of the project area committees and other stakeholders, and State law. In addition, the Agency should take into account the impact of Proposition F and determine an appropriate policy role that the Mayor should play.

Depending on what structure is selected, that might include the Mayor sitting in an *ex officio* capacity on the Agency Board, chairing a redevelopment commission, and/or being provided with broad appointment authority over redevelopment commission members.

In conclusion, I urge against a too-hasty effort to establish the Mayor as Redevelopment Agency Executive Director through a Charter amendment. Doing so risks legal, ethical, and administrative problems, and obscures the real question of what role the Mayor, as a City-wide elected official, should play in redevelopment.

Sincerely,

Michael D. Jenkins